

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL NO.1254 OF 1978

THE HON'BLE MR. JUSTICE Y.B. BHATT:

=====

1. Whether Reporters of Local Papers may be allowed to see the judgement?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Appearance:

Mr. V.C. Desai, advocate for the appellant.
Mr. S.K.Zaveri, advocate for the respondent.

ORAM: Y.B. BHATT J.

Date of Decision: 02-02-1996

JUDGEMENT

1. The present appeal is one under section 96 of Civil Procedure Code, wherein the appellant is the original plaintiff and the respondents are the original defendants. The plaintiff had filed Special Civil Suit No.45/72 in the Court of Civil Judge (Senior Division), Mehsana to recover a sum of Rs.13000/- with interest and expenses, from the defendants, being the amount of earnest money paid by the plaintiff to the defendants under an agreement of sale executed by the defendants in favour of the plaintiff.

2. The relevant and pertinent facts pleaded by the plaintiff are to the effect that the plaintiff is a partnership firm at Mehsana engaged in the business of purchase and sale of lands, construction of housing societies, etc.

2.1 Part of Survey No.1995/41 (which forms the subject matter of the agreement of sale) belonged to deceased Mohanlal Babaldas. The heirs and the Vahivat Karta of the deceased Mohanlal executed a Banakhat (Exh.91) dated 4th October 1971 in favour of the defendants. This Banakhat had a specific condition incorporated therein that the vendors of the defendant have to obtain N.A. permission. On the basis of this Banakhat in favour of the defendants, the defendants in turn executed a Banakhat in favour of the plaintiff dated 16th March 1972 (Exh.92). Under the said Banakhat the defendants were to execute a sale deed in favour of the plaintiff, for a sum of Rs.90501/-, and in consideration whereof the plaintiff had handed-over to the defendants a sum of Rs.11501 by way of earnest money.

2.2 As per the terms and conditions of the suit Banakhat Exh.92 the defendants had to obtain N.A. permission and also Title Clearance Certificate, and within 10 days of fulfilling this requirement, the plaintiff was required to obtain a sale deed from the defendants on making payment of the balance of the consideration.

2.3 According to the plaintiff it was ready and willing to perform its part of the contract and to pay the balance of the purchase price, but the defendants, under one pretext or the other, refused or were unable to execute the sale deed in favour of the plaintiff.

2.4 The plaintiff further averred that the defendants were required to obtain a sale deed from their own vendors under Exh.91 latest by 4th February 1972, but the defendants were unable to do so and therefore the vendors of the defendant served a notice dated 20th June 1972 (Exh.70) to the defendants, informing the latter that they have failed to abide by the conditions of the Banakhat and therefore the earnest money of Rs.10,000/- would be forfeited, if the balance of the purchase price is not paid within two days and the sale deed executed. The plaintiff, therefore, averred that inspite of the notice received by the defendants, the defendants failed to take a sale deed from their own vendors, and therefore the defendants were placed in a position where they could not possibly execute a sale deed in favour of the plaintiff. Under the circumstances the plaintiff served the defendants with a notice Exh.93, dated 26th June 1972 averring

therein that the vendors of the defendant have forfeited the security deposit of the defendants, and since the defendants have not paid the balance of the purchase price to their own vendors, and since the said Banakhat Exh.91 stood abrogated and/or rescinded, the defendants therefore had no surviving right, title or interest in the suit property which could be conveyed by the defendants to the plaintiff. Under the circumstances the plaintiff claimed in the said notice at Exh.93, the refund of the earnest money of Rs.11,501/- with Rs.2000/- by way of expenses incurred on the land, with 12% interest, etc.

2.5 In reply to the plaintiff's notice Exh.93, the defendants replied by way of Ex.73 dated 29th June 1972. The defendants averred in their reply that the Banakhat between them does not stand revoked and/or rescinded until the defendants' vendors do not get the Title Clearance Certificate. The defendants, therefore, required the plaintiff to pay balance of the purchase price and to obtain a sale deed in its favour.

2.6 Thus, in substance it was the plaintiff's case that the defendants have committed breach of the agreement of sale Exh.92, since the defendants have failed to obtain a sale deed from their own vendors, and consequently they are not in a position to execute a sale deed in favour of the plaintiff.

2.7 The plaintiff further averred that even if the Banakhat between the plaintiff and the defendants is subsisting, the defendants cannot legally execute a sale deed in favour of the plaintiff due to coming into operation of the Gujarat Vacant Lands in Urban Areas (Prohibition of Alienation) Act, 1972, and that in effect, the specific performance of the agreement has become impossible by operation of law.

3. The defendants contested the suit by filing their written statement at Exh.29. The defendants have strongly contested and denied the averments of the plaintiff on all material aspects, except that the Banakhat Exh.91 dated 4th October 1971 had been executed between the defendants and their vendors, and that the suit Banakhat Exh.92 had been executed between the parties, and that earnest money of Rs.11500/- was received by them from the plaintiff. The defendants' contention was that as per the terms and conditions of Exh.92 the defendants were required to execute a sale deed in favour of the plaintiff within 10 days of obtaining N.A. permission as also the Title Clearance Certificate in respect of the suit land. In this context they contended that they were willing to abide by the terms and conditions of the Banakhat Exh.92. The defendants further

contended that the defendants were ready to obtain a sale deed from their own vendors, under Exh.91, as soon as the vendors obtained N.A. permission and/or permission for sale under section 65 of the Bombay Tenancy and Agricultural Lands Act. The defendants further contended that their vendors had obtained the necessary NA permission or or about 1st June 1972, and accordingly informed the defendants on or about 3rd June 1972. Furthermore, the vendors of the defendant had also obtained the Title Clearance Certificate Exh.97 on 28th June 1972. The defendants, therefore, contended that the Banakhat Exh.91 between the defendants and their vendors was subsisting and alive, that the said vendors were ready and willing to pass a sale deed in favour of the defendants, and the defendants in turn were ready and willing to execute a sale deed in favour of the plaintiff in compliance with Exh.92, that the defendants have, therefore, completely abided by the terms and conditions of the said Banakhat and that it was the plaintiff who had abrogated and/or rescinded the Banakhat Exh.92 by issuing the notice Exh.93 and it was the plaintiff who was not ready and willing to pay the purchase price and obtain a sale deed in its favour. Under the circumstances the plaintiff would not be entitled to a refund of earnest money, which the defendants have a right to forfeit.

4. The defendants further denied that the execution of a sale deed in favour of the plaintiff on the part of the defendants had not become impossible by the provisions of the aforesaid special Statute, inasmuch as the same came into effect only on 12th August 1972, and that the defendants could have long before the said date executed a sale deed in favour of the plaintiff, provided the latter was ready and willing to pay the balance of the purchase price and to obtain the registered sale deed in its favour. However, before the said act came into force, the plaintiff had claimed abrogation of the Banakhat Exh.92 and claimed refund of earnest money.

5. The trial court raised issues at Exh.39 on the basis of the aforesaid pleadings. After recording evidence in the matter and on hearing the parties on the evidence and their submissions on the various aspects of the matter, recorded findings to the effect that it was the plaintiff who had, by his conduct abrogated or rescinded the contract Exh.92, that the specific performance of the agreement to sell was not hit by the provisions of the Gujarat Vacant Lands in Urban Areas (Prohibition of Alienation) Act, 1972, that the said Act did not create a bar to the transaction on the relevant date, that the defendants had acquired the right to forfeit the earnest money of the plaintiff, that the plaintiff therefore could not claim refund of such earnest money and the expenses together with interest thereon.

6. On the basis of these findings the trial court dismissed the suit of the plaintiff with costs. It is under such circumstances that the original plaintiff has filed the present appeal, challenging the dismissal of the suit.

7. In the present appeal I shall only deal with those contentions which have been specifically argued by learned counsel for the appellant and/or substantially pressed.

8. It was sought to be contended for the appellant that the Banakhat Exh.91 dated 4th October 1971 was executed by the vendors of the defendants in favour of the defendants by accepting Rs.10000/- as earnest money, and the sale deed pursuant thereto was to be executed on or before 4th February 1972. It was contended in this context that the defendants failed to take the sale deed from their vendors before the stipulated date since they did not have sufficient funds, and since the vendors' titles was defective, and consequently it should be held that the defendants have in their turn committed breach of the agreement Exh.92, which has been executed by the defendants in favour of the plaintiff. In support of this contention reliance was sought to be place don the evidence of Kantilal Mehta (Exh.89). Now if we refer to Banakhat Exh.91 (in favour of the defendants), it is crystal clear that the sale deed was to be executed in favour of the defendants on or before 4th February 1972, and the vendors of the defendants were to give the necessary signature for obtaining the requisite N.A. permission and Title Clearance Certificate, and the costs were to be borne by the defendants. In this context the witness Kantilal Mehta (Exh.89) has admitted in his cross-examination that the Banakhat at Exh.92 (in favour of the plaintiff) was executed with clear understanding that the plaintiff would get only that right, title and interest in the land, which the defendants would get under the Banakhat Exh.91 (in favour of the defendants). In short, both the parties knew that the defendants could convey and would convey only what the defendants obtained under the Banakhat at Exh.91. Furthermore, when the Banakhat Exh.92 is carefully examined, it becomes clear that the defendants had to obtain a Title Clearance Certificate and also N.A. permission, the sale deed was to be executed in favour of the plaintiffs within ten days next after the receipt of the aforesaid permission by the defendants. Moreover, the sale deed to be executed by the defendants was to be executed either in favour of the plaintiff or in the name of a party to be nominated by the plaintiff. A similar clause is contained in the Banakhat Exh.91 executed in favour of the defendants. In other words, the vendors of the defendants had also committed themselves executing a sale deed in favour of the defendants' nominees. It, therefore, becomes clear on a conjoint reading of these relevant terms of the two Banakhaths

that the vendors of the defendants were to execute a sale deed in favour of the defendants' nominees who, in turn, were to execute a sale deed in favour of the plaintiff's nominees, within ten days of the receipt of the N.A. permission and the Title Clearance Certificate. It is also an admitted fact that the N.A. permission and the Title Clearance Certificate had not been obtained till the date of execution of the Banakhat at Exh.92. It, therefore, becomes clear in term that the defendants were in the place of a confirming party, in respect of the sale deed which would have been executed by the vendors of the defendants, either in favour of the plaintiff or in favour of the plaintiff's nominee.

8.1 In view of this clear position, the appellant's contention cannot be upheld when a complaint is made that it was the defendants who failed to take the appropriate sale deed from its own vendors, inasmuch as the defendants lacked the necessary funds to obtain such a sale deed.

8.2 It may be noted that the vendors of the defendant issued a notice to the defendants (Exh.70) dated 20th June 1972, requiring the defendants to pay the balance of the purchase price and to obtain the necessary sale deed within two days of the notice, failing which the Banakhat between them (Exh.91) would stand cancelled and the earnest money would stand forfeited. However, the contents of para 3 of the said notice makes it amply clear that the N.A. permission was obtained on 1st June 1972 and the defendants were informed in this regard on 3rd June 1972. This by itself was not sufficient to execute a sale deed and transfer title to the defendants inasmuch as, on the date of the notice, the Title Clearance Certificate had yet not been obtained. It is, therefore, clear that the notice Exh.70 could not legitimately have brought an end to the obligations arising from the Banakhat Exh.91.

9. It appears that the plaintiff was in a great hurry inasmuch as within a week of the aforesaid notice by the vendors of the defendant issued to the defendant (to which the plaintiff was not a party), the plaintiff issued notice exh.93 to the defendants on 26th June 1972. Relying upon the notice Exh.70 issued against the defendants by the vendors of the defendants, the plaintiff alleged that the defendants have completely lost all right, title and interest in the suit land, and the plaintiff, therefore, claimed from the defendant the refund of the earnest money together with expenses. It is also pertinent to note that the plaintiff's notice Exh.93 was issued when the Banakhat Exh.92 was in fact in force. Thus, by its own conduct and on the basis of the allegations made in the said notice at Exh.93, it was the plaintiff who terminated the Banakhat Exh.92, even before the Title Clearance

Certificate had been obtained.

10. It may once again be noted that the defendants were to execute the sale deed within ten days of the receipt of N.A. permission as also the Title Clearance Certificate. However, instead of waiting for the aforesaid period of ten days to commence, which would only begin to run after the relevant documents were ready, the plaintiff acted prematurely, issued the notice Exh.93 dated 26th June 1972, and in effect abrogated or rescinded the Banakhat Exh.92. In this context it may be noted that the Title Clearance Certificate Exh.47 is dated 28th June 1972. Clearly, therefore, the plaintiff could have insisted upon a sale deed at the earliest on the expiry of ten days commencing from 28th June 1972. As aforesaid, the plaintiff has not waited for the crystallisation of his right, but has acted prematurely, and by alleging that the defendants have lost their capacity or ability to execute a sale deed in favour of the plaintiff, the plaintiff in substance treated the Banakhat Exh.92 as abrogated or rescinded, and specifically demanded a refund of the earnest money. The Trial Court was, therefore, justified in coming to the conclusion that it was the plaintiff who had brought an end to the Banakhat Exh.92, and therefore, he was not entitled to refund of the earnest money.

11. The defendants' replied to the plaintiff's notice Exh.93 by their reply Exh.73, dated 29th June 1972. In the said reply the defendants pointed out that the N.A. permission was obtained on 1st June 1972, and the Title Clearance Certificate (Exh.97) was obtained on 28th June 1972, and under the circumstances the defendants were prepared to pass a sale deed in favour of the plaintiff if the plaintiff was ready to pay the balance of the purchase price. This reply of the defendants (Exh.73) completely clarifies the picture and speaks volumes for the stand of the defendants. Even at this stage the defendants made it clear that not only were they now in a position to convey a sale deed in favour of the plaintiff, but they were ready and willing to do so. However, they also pointed out that in case the plaintiff fails to tender the balance of the purchase price and to take the sale deed as offered by the defendants, the earnest money under Exh.92 would stand forfeited. What requires to be noted is that even on 29th June 1972 the defendants were willing to treat the Banakhat Exh.92 as alive and subsisting, and were both ready and willing as also able to comply with the terms thereof. As against this, the conduct of the plaintiff is equally eloquent, inasmuch as even after receiving the defendants' reply at Exh.73, the plaintiff did not accept the defendants' offer to obtain a sale deed in its favour, and stuck by its earlier stand of repudiating the Banakhat at Exh.92 and insisting on refund of the earnest money.

11.1 Obviously the plaintiff cannot take shelter under the notice given by the vendors of the defendants to the defendants (Exh.70) inasmuch as it was merely a stand taken by the vendors of the defendants, which stand possibly may not have been legitimate. What matters is that as late as 29th June 1972 the defendants, by their reply Exh.73, had specifically conveyed to the plaintiff their readiness and willingness to execute a sale deed in favour of the plaintiff provided the plaintiff in its turn complied with the terms and conditions of the Banakhat at Exh.92, and particularly in making the payment of the balance of the purchase price. This offer, however, was ignored by the plaintiff, who insisted upon treating Exh.92 as revoked.

12. I do not see any merit in the contention raised on behalf of the appellant that Exh.91 in favour of the defendants was itself incapable of being implemented and that therefore the plaintiff was entitled to refund of earnest money. To entertain such contention would essentially put the cart before the horse. From the terms of Exh.92 it is obvious that the plaintiff knew that the plaintiff would only acquire what right, title and interest the defendants had in the property by virtue of Exh.91. Therefore, the plaintiff very well knew, when it became a party to Exh.92, as to what it was getting or what he was likely to get under Exh.91. The plaintiff cannot be permitted firstly to repudiate Exh.92, and then to justify that repudiation by attacking the defendants' possible title or interest under Exh.91.

13. Even otherwise the trial court has rightly found, as discussed in para 28 of the impugned judgement, that it is not possible to come to a conclusion that the defendants would not have obtained clear title in respect of the suit land under Exh.91.

14. It was next sought to be urged that the Gujarat Vacant Lands In Urban Areas (Prohibition of Alienation) Act, 1972 came into force on 12th August 1972, and that by virtue of coming into effect of the said Act it was not legally possible to execute a sale deed by the defendants in favour of the plaintiff. In this context it was sought to be urged that the defendants had not made any attempt to obtain necessary permission from the Government under the said Act, and therefore, even if the defendants had executed a sale deed in favour of the plaintiff, the same would have been of no effect. This submission is also not well founded. There is no resolution of the Government prohibiting the execution of sale deeds in respect of vacant lands, passed in March 1972. The plaintiff has not produced any such resolution prohibiting the execution of such a document. Exh.92 was executed on 16th

March 1972, and on the relevant date, it is not shown how the same was barred under the said Act.

14.1 In this context it may be noted that the Title Clearance Certificate Exh.97 is dated 28th June 1972, and it is also admitted by Kantilal Mehta (Exh.89) that he received the same along with the defendants' reply Exh.73 dated 29th June 1972. Thus, the sale deed could have been executed within ten days thereafter, in which case Exh.92 would have been fully complied with.

14.2 In the aforesaid context if we examine the evidence of Babalbhai Parshottamdas Patel (Exh.122), it is found that the Bill in respect of the aforesaid Act was published in the Gujarat Government Gazette on 3rd August 1972 and received the assent of the President on 11th August 1972. He has further deposed that documents of sale, both between private parties and also concerning societies, continued to be registered in his office upto 11th August 1972. He has further clarified that as per section 8(1) of the said Act the documents registered between 1st July 1972 and 12th August 1972 could be regularised by filing a declaration before the Collector. He has given instances of many such documents. It, therefore, becomes amply clear that once the Title Clearance Certificate Exh.97 was conveyed to the plaintiff by the defendants' reply dated 29th June 1972, there was ample and sufficient time for the plaintiff to pay up the balance of the purchase price and obtain a sale deed in its favour, before the absolute prohibition under the aforesaid act came into force on 11th August 1972. However, the plaintiff refused to accept the offer of the defendants, and for this they have only themselves to blame. Under the circumstances the Trial Court rightly found that the plaintiff is not entitled to refund of the earnest money paid under exh.92, nor to any expenses, notice charges, etc.

15. In the premises aforesaid the judgement and decree passed by the Trial Court is eminently sustainable and is, therefore, confirmed. Consequently this appeal must be dismissed. Accordingly this appeal is dismissed with no order as to costs.
